

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**T. HENLEY GRAVES**  
*RESIDENT JUDGE*

**SUSSEX COUNTY COURTHOUSE**  
**ONE THE CIRCLE, SUITE 2**  
**GEORGETOWN, DE 19947**

January 8, 2007

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RE: State v. Samuel Layton  
Defendant ID No. 0205011859 (R1)

Dear Counsel:

Having considered the pleadings, the Rule 61(g) affidavit, the Supreme Court's decision affirming the Defendant's conviction, and the trial transcripts, I have determined an evidentiary hearing is unnecessary. The Defendant's Rule 61 Motion is denied.

Following a trial in December, 2002, the Defendant was found guilty of four counts of rape in the first degree, six counts of unlawful contact, and continuous sexual abuse of a child. He was sentenced to serve 72 years at Level 5, followed by probation.

The State proved at trial that the Defendant was involved in sexual conduct with his significant other's two daughters, including having them perform oral sex on each other in his presence. Both girls testified. The victims mentioned a purple, sparkly dildo which the Defendant possessed during some of the conduct. The girls' mother testified he owned such a dildo.

Another child, who didn't know the victims, testified she was shown a purple, sparkly dildo at Defendant's place of employment, a coffee shop.

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On appeal, the Defendant attacked the rape first degree charges as to the girls having oral sexual intercourse. His theory was it could not be rape in the first degree, but it could be sexual extortion. He also argued the testimony about the dildo at his coffee shop was irrelevant and prejudicial.

The Supreme Court affirmed his conviction stating that rape in the first degree were proper charges, and the dildo was relevant as to identification. *Layton v. State*, 2003 WL 22001181 (Del. Aug. 4, 2003).

On July 17, 2006, Mr. Bernstein filed a Rule 61 Motion. Extensions were granted for the Rule 61(g) request by the Court and for Mr. Bernstein to have the opportunity to reply.

### **GROUND**

The Defendant first argues that counsel was ineffective at trial for several different reasons. I will address each in the order presented. As to each of these claims, the Defendant has the burden of establishing that his attorney's performance was objectively deficient and that the attorney's deficient performance cause the Defendant prejudice. *Strickland v. Washington*, 466 U. S. 668 (1984).

(1) (a) The Defendant alleges trial counsel failed to conduct any investigation concerning prior sexual abuse of the victims, including a Terry McGee and another unknown person. In reviewing the transcripts, Defendant's trial counsel did pursue these allegations obtaining admissions from the victims' mother that the girls reported it to her. Trial counsel also called an adult who was a former babysitter of the girls. This person testified in detail as to what one daughter told her as to prior sexual abuse. This was therefore before the jury and the jury could determine its weight and value as to an explanation of the allegations against the Defendant and as to credibility issues.

Based upon the above, it is clear that trial counsel did investigate and place this before the jury. The present petition goes no further than alleging a proper investigation was not conducted. It does not state who the defense missed or what a proper investigation would have found.

In summary, the allegation is wrong and it is also conclusory.

(1) (b) The defense alleges a proper investigation would have uncovered that one of the victims was seeing a school psychologist concerning "an unknown incident". The motion does not provide the Court with any basis to determine trial counsel was deficient in not investigating this

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allegation. There is nothing to support why trial counsel should have known about the school psychologist or any basis that any of this was somehow relevant. This conclusory claim fails.

(2) The defense alleges trial counsel was deficient for not conducting any investigation concerning the relationship between the non-victim witness who saw the dildo in the coffee shop office, and her stepfather, a Georgetown police officer. The defense further alleges “Trial counsel failed to investigate any connection between Atwell (the stepfather) and the victims' mother Virginia Lorah, a Georgetown EMT officer, and whose former husband, Randy Lorah, was also a Georgetown police officer”.

In his Rule 61(g) affidavit, trial counsel states he was fully aware of the relationship but there was nothing to point to any improper action or conspiracy by the officers or any reason to believe the witness had been told to make up her statements as to the dildo.

The Rule 61 motion is conclusory because it does not state what a “proper investigation” would have disclosed and how such an investigation would have benefitted the defense. The defense has not established that (i) a proper investigation was not done; (ii) further investigation would have been fruitful; and (iii) any prejudice occurred.

(3) This allegation states:

“Trial counsel also failed to investigate any motive on the part of Brandewie to testify against the defendant arising out of an incident between Brandewie and the defendant which caused the defendant to be arrested by the Georgetown police and the role played by Atwell in that arrest.”

In the Rule 61(g) affidavit, trial counsel reports that he knew of Atwell's participation in the investigation. He did conduct an investigation but did not learn of anything that was done improperly which could have been the basis of any attack. The present motion does not offer anything either. The defense makes the above allegation which is more of a conclusory comment. The defense does not assist the Court in how trial counsel dropped the ball. Nor does he allege specific prejudice. The fact that the police knew the victims and that an officer on the Georgetown police department was related to the victims or a witness does not create an inference of a conspiracy against the Defendant. This claim fails factually and as to establishing any prejudice.

(4) The Defendant alleges that trial counsel failed to interview Kevin Monaghan, the owner of the coffee shop where the dildo was allegedly seen. There is no present allegation as to how Mr. Monaghan might have been helpful. This allegation fails as it does not establish that counsel failed to investigate and had he done so, there would have been information obtained that

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would have materially assisted the defense. Trial counsel has not been shown to be deficient. No prejudice has been alleged.

Finally, trial counsel noted in his Rule 61(g) affidavit that he believed he did speak with Mr. Monaghan, but even if it is assumed Mr. Monaghan had no knowledge of any dildo, that lack of knowledge would not translate into any inference that the Defendant had not shown a dildo to the witness.

(5) (a) The Defendant alleges trial counsel failed to interview persons who might have information as to the credibility of the witness who observed the dildo at the coffee shop. This is a conclusory allegation that presumably is based on an assumption that there is someone out there who may have something to offer as to the credibility of this witness. Trial counsel states in his Rule 61(g) affidavit that the Defendant did not provide any information as to her credibility. The defense has not provided any basis for concluding that trial counsel was deficient in a manner that caused prejudice.

(b) The defense alleges trial counsel failed to conduct an effective cross-examination to bring out inconsistencies in her statements as well as victims' statements. This is all the defense alleges other than the comment that the Court can decide this claim on the record. This claim is denied as it is not the Court's responsibility to conduct an investigation of the conclusory claims, read the transcripts and any out-of-court statements and then determine if inconsistencies exist. Then presumably the Defendant wants to Court to determine how counsel was ineffective and then consider the question of prejudice. I consider this a conclusory allegation. The Defendant has not met his burden of establishing a deficiency which caused him prejudice.

In summary, as to these six allegations, either the defense is mistaken as to whether an investigation took place, or the defense boldly throws conclusory allegations against the wall in the hope that something may stick. The burden is upon the Defendant to make specific allegations of erroneous or deficient conduct by his trial attorney and then at least argue why, or how, prejudice may have occurred.

Finally, the Defendant also alleges ineffective assistance of counsel as to the appeal. He argues appellate counsel did not effectively argue that the proper charge was really sexual extortion. This claim is denied because no matter what trial counsel may have argued, the Supreme Court has determined that the Defendant could be found guilty of rape by forcing the two children to have oral sexual intercourse. The Defendant does not offer why the Supreme Court was mistaken. This claim is denied as the Defendant can show no prejudice.

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The Rule 61 Motion is denied.

**IT IS SO ORDERED.**

Yours very truly,

T. Henley Graves

THG:baj  
cc: Prothonotary